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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1974

No. 74-6079

DELBERT BEARD,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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In The

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DELBERT BEARD,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Delbert Beard, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered on November 27, 1974 affirming the opinion of the Appellate Court of Illinois, First District, Third Division.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois affirming the Appellate Court of Illinois is reported as *People* v. *Delbert Beard* at 59 Ill. 2d 220 (1974), and is included as an appendix to this petition.

The opinion of the Appellate Court affirming the Circuit Court of Cook County, Criminal Division is reported as *People* v. *Delbert Beard* at 15 Ill. App. 3d 663 (1973) and is also included as an appendix. No opinion was filed in the court of first instance.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Supreme Court of Illinois was entered on November 27, 1974. This petition is timely filed within 90 days of that judgment. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

QUESTION PRESENTED FOR REVIEW

Whether, because pleas of guilty and admissions to violations of probation are substantially identical, due process and equal protection require that, as in pleas of guilty, courts, before accepting such admissions to probation violations, admonish the probationer personally in order to assure that such admissions are knowingly and intelligently entered.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Illinois Revised Statutes, Ch. 110A, par. 402 (1973):

"In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) *Admonitions to Defendant.* The Court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

(b) *Determining Whether the Plea Is Voluntary.* The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

(c) *Determining Factual Basis for Plea.* The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.

* * *"

STATEMENT OF THE CASE

Petitioner Beard was charged by the People of the State of Illinois with the offenses of theft and criminal trespass to vehicle. He was found guilty of both charges, and on April 11, 1968 Judge Thomas McMillen placed him on probation for a period of 24 months.

On June 25, 1969, the Honorable Joseph Power, Presiding Judge of the Circuit Court of Cook County, Criminal Division, issued a warrant for petitioner's arrest on grounds that he had "failed to report to his Probation Officer" and could not be located. Thereafter, in his report to the court, the Probation Officer also charged that "the subject was convicted of Bank Robbery . . . in Detroit, Michigan and was sentenced to a term of twenty-five years in U.S. Penitentiary . . ." At his probation revocation hearing held in June of 1972 before his Honor Judge Power, petitioner's appointed attorney stated that probationer "admit[ted] to the conviction of bank robbery" charged as a violation of probation. At no time during the hearing, however, did the court inquire personally of the probationer as to whether counsel's action was knowingly and intelligently endorsed by him or whether he approved of the waiver of his rights occurring thereby.

Notice of appeal was thereafter filed from this revocation and the matter was appealed to the Appellate Court of Illinois, First District. One of the issues advanced on appeal was the contention that the court erred in accepting the admission to the occurrence charged as a violation of probation (committing the bank robbery) without first making

a determination of whether this waiver by counsel of probationer's rights was knowingly and intelligently approved by the probationer by personally addressing him as required by due process and this Court's decision in *Boykin* v. *Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969). The argument was rejected by that court (*People* v. *Beard,* 15 Ill. App. 3d 663 (1973);) and Petition for Leave to Appeal to the Illinois Supreme Court was filed.

The Petition was granted, but the contention before the court that due process and equal protection require that probationers who admit their violations be treated similar to defendants who admit their crimes was likewise rejected. The Illinois Supreme Court thus declined to require that, before acceptance by the trial court, the admissions of a probationer be found knowing and intelligent by direct judicial inquiry, and refused to extend to probationers the same protections and safeguards now available to those who plead guilty. (*People* v. *Beard,* 59 Ill. 2d 220 (1974)).

REASONS FOR GRANTING THE WRIT

BECAUSE PLEAS OF GUILTY AND ADMISSIONS OF PROBATION VIOLATIONS ARE SUBSTANTIALLY IDENTICAL, DUE PROCESS AND EQUAL PROTECTION REQUIRE THAT, AS IN PLEAS OF GUILTY, COURTS, BEFORE ACCEPTING SUCH ADMISSIONS OF PROBATION VIOLATIONS, ADMONISH THE PROBATIONER PERSONALLY IN ORDER TO ASSURE THAT SUCH ADMISSIONS ARE KNOWINGLY AND INTELLIGENTLY ENTERED.

Petitioner Beard contends, in seeking this writ, that the trial court erred in accepting counsel's stipulation of the facts constituting the alleged probation violation without personally addressing the petitioner and ascertaining that he knowingly and intelligently waived his privilege against self-incrimination and his right to challenge the allegations in a trial on the merits conducted in accordance with due process of law. Petitioner contends that such stipulations, like guilty pleas, should be accompanied by a procedure of personal admonishments similar to that required by this Court in *Boykin* v. *Alabama,* 395 U.S. 238 (1969) in order to assure the court, prior to its acceptance of the stipulation, that the accused is aware of, and voluntarily and intelligently relinquishes, the constitutional rights to which he is entitled.

Initially, we point out that petitioner's probation was revoked and sentence of imprisonment was imposed at a combined revocation and sentencing hearing such as was before the Court in *Mempa* v. *Rhay,* 389 U.S. 128 (1967). In line with this Court's earlier decisions, petitioner submits that a higher degree of safeguards applies here than in cases where sentence has already been imposed.

Currently, under the obligation imposed by *Boykin,* judges accepting pleas of guilty must, by direct inquiry, ascertain and establish that such pleas are knowingly and intelligently entered and that defendant freely waives his rights to trial by jury, to confront witnesses and to avoid self-incrimination. *Boykin,* however, did not consider the situation here, where petitioner admitted, not a violation of the law, but a violation of a condition of probation. Currently, also, probationers enjoy several substantial and important rights propounded by this court in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973). But those cases imposed rights in situations where denial of the violations is made and probationers are then allowed notice, opportunity to be heard, confrontation, and a neutral factfinder. Those cases do not, however, contemplate the procedures to be followed where probationers admit the violations as charged and are thereby subjected to imprisonment. Just as there are pleas of guilty to criminal charges, there are in many cases pleas of guilty to violations of probation. Such situations are certainly common in State and Federal courts, and until this Court considers the issues of what rights pertain to probationers who admit violations, the status of those rights remains unclear.

It is petitioner's contention that the constitutional obligations of due process and equal protection demand that determinations of knowing and intelligent waivers of rights be imposed upon judges who accept such admissions as it is upon judges who accept pleas of guilty. And that among the rights being extended to probationers should be that of requiring the finding of such a waiver before admissions are accepted and probations revoked.

To be sure, the result here urged is necessitated by this Court's decision in *Gagnon* which assured persons on probation of the standards of due process as required by *Morrissey*. This Court will recall that *Morrissey* held that a parolee could not be deprived of his liberty without being afforded the right to confront and cross-examine his accusers and the opportunity to be heard and to present witnesses and evidence in defense. These important rights were extended by *Gagnon* to persons on probation. (While confrontation was admittedly made optional by this Court in those cases, the burden is not upon the probationer to establish its propriety, but upon the "hearing officer" to establish "good cause" to excuse such confrontation, and in procedures more formally structured than those contemplated in *Morrissey* or *Gagnon*, like those in Illinois, little convincing argument can be proposed in support of such suspension.)

With the exception of the right to trial by jury, probationers in a judicial proceeding now have much the same rights to avoid self-incrimination and confront witnesses deemed so important in *Boykin* that they could not be surrendered upon entry of a guilty plea without personal inquiry of defendant by the trial judge. The fact that probationers now have these rights should require a *Boykin*-type personal inquiry of the probationer before those rights are surrendered. In the instant case, counsel for petitioner, by stipulating to the facts allegedly constituting a violation of probation, and the court, by accepting that stipulation without inquiry, effectively deprived petitioner of his Fifth and Sixth Amendment rights without his express consent or waiver.

The significance of this occurrence is apparent. Regardless of several minor distinctions which arise, both pleas

of guilty and admissions of probation violations may, and most often do, result in the incarceration of the individual offering the admission. In fact, it seems fair to say that almost all decisions to revoke probation result in the probationer being sent to jail and that such is the objective sought by the prosecution. Since it was this Court's belief in *Boykin* that determination that the plea was entered knowingly and intelligently was sufficiently crucial to require inquiry, the voluntariness of the waiver of rights accompanying a stipulation which is certain to result in incarceration should be equally crucial and the requirement of inquiry equally applied. In both pleas and admissions the accused foregoes the essential constitutional rights of self-incrimination and confrontation, two of the three rights enumerated in *Boykin*. By doing so, and especially by waiving his privilege against self-incrimination, the probationer assures his own conviction and supplies the basis for his imprisonment. To insure the voluntariness of such a decision, admonishments need be conveyed to an accused before acceptance of a plea of guilty. Since persons similarly situated should be similarly treated, equivalent admonishments should be addressed to probationers who admit the charges of probation violations.

In the somewhat similar instance of the "stipulated bench trial" of *Brookhart* v. *Janis*, 384 U.S. 1, 16 L.Ed. 2d 314, 86 S.Ct. 1245 (1966), this Court noted that the "proceeding . . . was the equivalent of a guilty plea . . . in which he would not have the right to be confronted with and cross-examine the witnesses against him." (16 L.Ed. 2d at 318). Like defendant Brookhart, probationer Beard faced a proceeding which was equivalent to a guilty plea since he admitted the allegations against him. He, too, was convicted and imprisoned after surrendering his right to confront and cross-

examine witnesses. Although in *Brookhart,* the Court felt that, because of the objections stated by defendant, he did not acquiesce in the waiver by counsel, here there should have been inquiries by the Court creating an assurance that probationer Beard acquiesced in counsel's waiver and admissions of guilt before the stipulation was accepted by the court. Otherwise, as in *Brookhart,* counsel for probationers who admit violations would "waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him" (16 L.Ed. 2d at 319), thereby stipulating probationer into prison without the apparent consent of the accused. Probationers do have the right to deny the charges and face their accusers in a hearing. To accept a stipulation to the alleged violation without a direct inquiry of the probationer is to accept the "practical equivalent of a plea of guilty" (16 L.Ed. 2d at 319) without the showing of the personal waiver of rights deemed essential by this Court in *Brookhart* and *Boykin.*

In short, as this Court noted in *Gagnon,* the loss of the liberty of a probationer, like that of a parolee, "is a serious deprivation requiring . . . due process." (36 L.Ed. 2d at 661). Such due process ought equally to include the determination that the actions of probationers, by which they surrender that liberty and provide grounds for their incarceration, are knowingly and intelligently undertaken.

Prior to the decision below several Illinois courts had held that warnings as here urged were required prior to acceptance of an admission of a probation violation. Although these Illinois decisions were founded upon Illinois Supreme Court Rule 402, relating to admonishments required in accepting pleas of guilty, the decisions were in substance founded upon the Fourteenth Amendment and

the decision of this Court in *Boykin* v. *Alabama*. This conclusion follows directly from the fact that Illinois Rule 402 was intended to codify the requirements of *Boykin*. In holding that Rule 402 applied with equal force to probation violation proceedings, the lower Illinois courts were in effect extending the protection of *Boykin* to probation revocation proceedings. That is precisely what we request this Court to do in this case.

Thus, because the issue is one crucial to probationers facing revocation and because this Court has implied, though not expressed, that protection of this kind is required, petitioner urges that certiorari be granted in order to review the decision below and to allow this Court to consider the rights applicable to probationers who admit the charges of probation violation.

CONCLUSION

For the reasons asserted herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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February 21, 1975

APPENDIX A

APPELLATE COURT OPINION

57966

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

DELBERT BEARD,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County, Illinois.
Honorable JOSEPH A. POWER, *Judge Presiding.*

Mr. Justice McNamara Delivered The Opinion Of The Court:

Defendant, Delbert Beard, was charged with theft and criminal trespass to a vehicle. After a bench trial in the circuit court of Cook County, he was found guilty of both charges and placed on probation. Subsequently, he was charged with a violation of probation. The judge who had conducted defendant's trial and admitted him to probation was no longer a member of the circuit court bench; therefore the presiding judge of the criminal division conducted the revocation of probation hearing. On June 21, 1972, defendant's probation was revoked, and he was sentenced to a term of two to eight years in the penitentiary to be served consecutive to a federal sentence of 25 years for bank robbery currently being served by defendant.

Defendant contends on appeal that the State, in violation of statute and due process, failed to hold a revocation

hearing within a reasonable time after his apprehension, thus entitling him to dismissal of the rule to show cause; and that the trial court's acceptance of the defendant's admissions to the violations of probation without admonishment under Supreme Court Rule 402 was reversible error. Defendant also urges that the sentence imposed for violation of probation be vacated and remanded to the trial court for a fuller inquiry into the original offense and defendant's background, or in the alternative, that the sentence is excessive and should be reduced.

On April 11, 1968, defendant was admitted to probation on the theft and criminal trespass charges. In December 1968 defendant was arrested on a federal charge of bank robbery in Michigan. He was convicted of that charge, and, on October 24, 1969, he was sentenced to 25 years in the federal penitentiary. In July, 1971 defendant was transferred to a federal penitentiary in Illinois.

In June, 1969, defendant's probation officer had requested that defendant's probation be revoked and that a warrant be issued for his arrest on the grounds that defendant had not reported and could not be located. On May 24, 1972, the trial judge issued another warrant for defendant's arrest. This was served on defendant and on June 8, 1972, the court ordered defendant to show cause why his probation should not be revoked. At the revocation hearing on June 21, 1972, defendant admitted through his counsel that he failed to report to his probation officer and that he had been convicted of bank robbery subsequent to being placed on probation. Defense counsel's oral motion to dismiss the rule for failure to hold a revocation hearing within a reasonable time after defendant's apprehension was denied.

Defense counsel then requested that any sentence imposed run concurrent with the federal sentence; however, the trial court sentenced defendant to a term of two to eight years consecutive to the federal sentence.

Defendant initially contends that the trial court erred in denying his oral motion to dismiss the rule to show cause. The statute then in effect (Ill.Rev.Stat. 1972, ch. 38, par. 117-3(b)), required that "when a warrant is issued the court shall within a reasonable time after the apprehension of the probationer conduct a hearing on the issue of the probation violation * * *" (The present Unified Code of Corrections (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 1001 *et seq.*) effective January 1, 1973, has deleted any reference to the probation violation hearing being conducted within a reasonable time after apprehension.) The thrust of defendant's argument may be summarized as follows: that in June 1969 when an arrest warrant was issued for his failure to report to the probation officer he was in federal custody and thus for purposes of the statute had already been apprehended; that he thereby was "constructively in State custody" because State officials could have located his presence by prompt inquiry to the federal correctional system; and that the delay until 1972 was unreasonable and entitled him to a dismissal of the rule.

We find, however, that defendant was not in the constructive custody of the State merely because he was in the actual custody of the federal authorities. We further find that under the facts and circumstances of the present case there was no duty on the part of the State to make prompt inquiry of the federal correctional authorities to determine whether they knew of defendant's whereabouts. Indeed, under defendant's reasoning, it would have been necessary

for the State to inquire, not just of the federal correctional system, but also of all the other State jurisdictions, to avoid the claim that defendant was in the constructive custody of Illinois. From the record it would appear that Cook County probation officials learned that defendant was in prison some time after he was transferred to the federal prison in Illinois. Thereafter, at their request, in May 1972 the trial court issued a warrant, and the hearing on the violation occurred in June, 1972. For purposes of compliance with the Illinois statute, we believe that defendant's "apprehension" took place when this warrant was served. The trial court correctly denied defendant's motion to dismiss the rule.

Defendant's next contention is that the trial court erred in accepting defendant's admissions to the violations of probation without giving him the necessary admonishments in accordance with Supreme Court Rule 402 dealing with guilty pleas. In support of this contention, defendant cites *People* v. *Watkins* (1973), 10 Ill.App.3d 875, 295 N.E.2d 546, in which the Fourth District of this court adopted his argument.

In the present case, defendant stipulated through his attorney that he failed to report to his probation officer and that, subsequent to being placed on probation, he was convicted of bank robbery. The trial court then revoked defendant's probation.

In a recent case, *Gagnon* v. *Scarpelli* (1973), ... U.S. ....., 36 L.Ed. 656, the United States Supreme Court has set forth basic due process requirements for revocations of probation. The court held that a probationer was entitled to a notice of the alleged violations, to have the op-

portunity to appear and present evidence, a conditional right to confront adverse witnesses, an independent decision maker, and a written report of the hearing. The court, in language pertinent to this appeal, stated at p. 666:

> We deal here not with an accused's right in a criminal prosecution but with a more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.

We believe it significant that in *Gagnon* the court made no reference to *Boykin* v. *Alabama* (1969), 395 U.S. 238, the decision in which it enunciated the procedures and admonishments required before the acceptance of guilty pleas. Moreover, the Second District of this court has held that a trial court need not give the admonishments required under Supreme Court Rule 402 before accepting defendant's admissions of probation violations. *People* v. *Evans* (1972), 3 Ill.App.3d 435, 278 N.E.2d 401. Also see *People* v. *Thornton* (1972), 4 Ill.App.3d 896, 282 N.E.2d 276.

An admission of a probation violation is significantly different in nature and effect from what is involved in a plea of guilty to the original criminal charge. A probationer has no right to a hearing by a jury, and the State is required to prove the violation only by a preponderance of the evidence, rather than by proof beyond a reasonable doubt. Often, as in the instant case, the incriminating evidence is a matter of public record. And by admitting the probation violation, the defendant merely waives the formality of the introduction into evidence of a certified copy of the conviction which has served as the basis for the probation violation charge. We conclude that the procedures under Supreme Court Rule 402 are not applicable to probation revocation hearings. After defendant admitted to

the violations of probation, the trial court did not abuse its discretion in revoking probation.

Defendant finally argues that the sentence imposed for violation of probation should be vacated and the cause remanded for a fuller inquiry into the original offense and into defendant's background, or in the alternative, that the sentence is excessive, and should be reduced.

As has already been noted, the present trial judge was not the judge who placed defendant on probation. An examination of the record at the probation revocation hearing indicates that the sentencing judge knew only that defendant had been convicted of theft and criminal trespass to a vehicle, had been admitted to probation for those two charges, and then shortly after had been accused and convicted of bank robbery. Defense counsel waived offering any evidence in mitigation, but the present situation was more than a waiver or a failure to conduct a hearing in aggravation and mitigation. The trial judge had not been made aware of any facts concerning the offenses for which defendant had been placed on probation. Hence there is nothing in the record by which the propriety of the sentence for the probation violation can be determined. The sentence therefore is vacated, and the cause is remanded for a sentencing hearing in accordance with the Unified Code of Corrections.

Accordingly, the judgment revoking probation is affirmed, the sentence is vacated, and the cause is remanded for resentencing consistent with the holdings contained in this opinion.

Judgment affirmed and remanded.

DEMPSEY, P.J., and McGLOON, J., concur.

APPENDIX B

SUPREME COURT OPINION

Docket Nos. 46317, 46382 cons.—Agenda 11

September, 1974.

The People Of The State Of Illinois, Appellee, v. Delbert Beard, Appellant.—The People Of The State Of Illinois, Appellee, v. Thomas Ray Blake, Appellant.

Mr. Justice Kluczynski Delivered The Opinion Of The Court:

These consolidated appeals involve the primary issue of the applicability to probation revocation proceedings of our Supreme Court Rule 402 (50 Ill.2d R. 402) which establishes the procedure for the acceptance of guilty pleas. The various appellate districts are not uniform in their resolution of the matter.

In cause No. 46317, defendant, Delbert Beard, was convicted of theft in excess of $150 and criminal trespass to a vehicle on March 28, 1968, following a bench trial in the circuit court of Cook County. He was granted probation for two years. In June, 1969, the State sought to revoke probation contending that defendant had failed to report to his probation officer and he could not be located. A report filed by the probation officer in June, 1972, asserted that defendant had participated in a Michigan bank robbery on December 5, 1968, during the probation period, which resulted in a Federal conviction and a 25-year penitentiary sentence. His Federal conviction

was affirmed on appeal prior to the State revocation proceeding now at issue. *United States* v. *Serio a/k/a Delbert Beard* (6th Cir. 1971), 440 F.2d 827, *cert. denied*, 404 U.S. 838.

A probation revocation hearing was conducted in June, 1972, at which Beard's attorney, after consulting him, admitted defendant's Federal conviction and his failure to report to his probation officer. The trial court revoked probation and sentenced Beard to the penitentiary for a term of two to eight years. The First District Appellate Court affirmed the revocation order but vacated the sentence and directed that defendant be resentenced in accordance with the Unified Code of Corrections. (*People* v. *Beard*, 15 Ill. App. 3d 663.) We granted leave to appeal.

In cause No. 46382, defendant, Thomas Blake, had pleaded guilty to theft in excess of $150 in the circuit court of Winnebago County and had been granted probation. The State thereafter filed a petition to vacate probation asserting that defendant had committed a burglary during the probationary period. Initially the trial court revoked his probation after the defendant admitted participation in the burglary, but this order was subsequently vacated when defendant indicated some uncertainty that the offense upon which the probation revocation petition was premised was actually the burglary in which he participated. At the new hearing defendant had apparently reconsidered his prior objection and he freely admitted his participation in the burglary. A hearing in aggravation and mitigation was held, probation was revoked and defendant was sentenced to the penitentiary for a term of one of five years. The Second District Appellate Court affirmed but remanded

the cause for resentencing in compliance with the Unified Code of Corrections. (*People* v. *Blake,* 15 Ill. App. 3d 39.) We granted leave to appeal.

Defendant Beard contends that a stipulation was entered to the act charged as a violation of his probation without warnings comparable to those required by Rule 402 which, he asserts, is designed to inform an accused of the consequences of his admission and to assure its voluntary nature. Similarly, defendant Blake maintains that at no time during the revocation proceedings was he advised as to the minimum and maximum sentences which could be imposed for theft in excess of $150 upon the revocation of his probation, his right to remain silent and not admit to the violation charge, and of the State's burden to prove the violation by a preponderance of the evidence at a full evidentiary hearing where defendant could confront adverse witnesses and call witnesses in his own behalf. Thus Blake concludes that he was denied due process of law. Both defendants rely upon opinions of the Fourth District Appellate Court (*People* v. *Watkins,* 10 Ill. App. 3d 875; *People* v. *Bryan,* 5 Ill. App. 3d 1006) that interpreted this court's decision in *People* v. *Pier,* 51 Ill.2d 96, as requiring the implementation of Rule 402 in probation revocation proceedings.

In *People* v. *Pier,* the defendant filed a post-conviction petition challenging the validity of the proceeding that culminated in revocation of probation. He alleged that his admission to the probation violation was induced by an unfulfilled prosecution promise. We concluded that a probation revocation proceeding was comparable to the entry of a guilty plea insofar as consideration of the voluntari-

ness of a defendant's admissions made in both instances and that an unfulfilled prosecution promise which induced such admission at the revocation hearing was properly subject to post-conviction relief. Within this context we observed:

> "* * * The consequences of a determination that the probation order has been violated are so serious that the appellate courts have surrounded the defendant at a revocation hearing with many of the same due-process safeguards that are accorded to a defendant at a trial to determine his guilt. [Citations.] Since the results of a probation revocation may be a deprivation of liberty and, consequently, as serious as the original determination of guilt, we agree with the holdings of these cases that due process of law requires that a defendant charged with having violated his probation be entitled to a conscientious judicial determination of the charge according to accepted and well recognized procedural methods. [Citation.] He is not, however, entitled to a jury trial. [Citation.] He is entitled to counsel. [Citations.] Justice demands that he also be entitled to the protection of the same due-process requirements which pertain to pleas of guilty when he waives his right to a judicial determination of the charge that he violated his probation and confesses or admits the charges of the revocation petition." 51 Ill. 2d at 99-100.

We cannot subscribe to the broad constitutional basis which defendants seek to engraft upon our decision in *People* v. *Pier*. The aforesaid language of that opinion must be interpreted within the factual circumstances presented

in that case. (*People* v. *Arndt*, 49 Ill.2d 530, 533.) In *People* v. *Pier* we did not consider the applicability of Rule 402 upon probation revocation proceedings. We merely expressed the view that due process required that a defendant's admission must be voluntarily made.

The State has emphasized that subsequent to our decision in *People* v. *Pier* the United States Supreme Court in *Gagnon* v. *Scarpelli*, 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756, held that a defendant is entitled to due process of law in proceedings to revoke probation. It has been recognized that the concept of due process is flexible, but "To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494, 92 S. Ct. 2593.

Thus in *Gagnon* v. *Scarpelli* the probationer's constitutional claim for the unqualified right to counsel at a probation revocation proceeding was rejected. The court reasoned that such proceeding was not a step in the criminal prosecution and it compared the process to parole revocation (*Morrissey* v. *Brewer*) noting that a parolee or probationer had already been convicted of a criminal offense. The court therefore held that " 'minimum requirements' " of due process could be applied to such a proceeding.

We note that in *Gagnon* v. *Scarpelli* the court was confronted with a situation wherein the determination to

revoke probation was made by the Wisconsin Department of Public Welfare. Unlike that case our present statutory provisions dealing with probation revocation require that judicial proceedings be conducted to determine the fact of the violation alleged in the revocation petition. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(b).) At these proceedings "The State has the burden of going forward with the evidence and proving the violation by the preponderance of the evidence. The evidence shall be presented in open court with the right of confrontation, cross-examination, and representation by counsel." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(c).) A defendant may appeal an adverse decision revoking probation. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-4(g); Supreme Court Rule 604(b), as amended effective September 1, 1974.) Under the applicable case law and statutory provisions in effect at the time that the probation of each of the present defendants was revoked the same procedural safeguards were available. (*People* v. *Crowell,* 53 Ill.2d 447, 451; *People* v. *Price,* 24 Ill. App. 2d 364, 376-377.) We conclude that the defendants have been afforded procedural safeguards comportable with those mandated in *Gagnon* v. *Scarpelli* which insure the interest of a probationer "that his liberty is not unjustifiably taken away and the [interest of] the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." 411 U.S. at 785, 36 L. Ed. 2d at 663-664.

Rule 402 was formulated to secure proper entry of guilty pleas. (*People* v. *Krantz,* 58 Ill.2d 187, 194-195.) A defendant in a criminal trial or a probation hearing may

ultimately be incarcerated as a result thereof, but there is a qualitative difference between a criminal conviction and the revocation of probation as recognized in *Gagnon* v. *Scarpelli.* (See also *People* v. *Grayson,* 58 Ill.2d ....., ...) We therefore hold that Rule 402 is not applicable to probation revocation proceedings.

Having examined the contention of defendant Beard, we do not believe that he was denied due process of law at the revocation hearing. There has never been a challenge to the conviction for which Beard was granted probation. The only factual matter involved in the revocation proceeding was Beard's failure to report to his probation officer, which could only be explained by his Federal detention and subsequent conviction in August, 1969. The fact that defendant's counsel admitted these facts eliminated a minimal necessity of proof which the State would ordinarily have been required to introduce. Defendant cannot claim that he was prejudiced by his counsel's admission nor can he claim that justice was denied. (See *People* v. *Dudley,* 58 Ill.2d 57, 60.) The judgment of the appellate court in cause No. 46317 is affirmed.

The record in cause No. 46382 indicates that defendant Blake was informed of the possible penitentiary sentence which could be imposed when he pleaded guilty and requested probation and there has been no attempt to question the validity of the guilty plea proceedings. The trial court at the time the guilty plea was entered further informed defendant of his right to confrontation and his right to present evidence in defense of the charge. Thereafter, during the first hearing on the probation revocation petition defense counsel was appointed and he immediately

entered a denial of the allegation contained therein and requested a continuance. At subsequent hearings it was never disputed that Blake had committed a burglary. Rather the only question which arose was whether the burglary alleged in the revocation petition was the one in which Blake was involved due to his inability to recall if a television set was actually taken as indicated by the assistant State's Attorney. The record further reveals that during the course of the proceedings the trial court instructed Blake that the violation alleged in the revocation petition was a felony and an admission thereto would probably result in probation revocation. A factual basis for the violation was established and Blake stated that he had voluntarily confessed his participation in the burglary to the police and was now admitting his participation for the sole reason that he did commit the offense. There is no contention made that any promises were made to Blake in an effort to induce this admission. We find that the entire record supports the conclusion that Blake was afforded due process of law during the revocation proceedings in which he voluntarily admitted the probation violation.

Blake further alleges that the trial court in sentencing him to the penitentiary improperly considered evidence of numerous juvenile arrests and a commitment that were not adjudications of delinquency. He predicates his argument on a prior probation report to which defense counsel initially directed the trial court's attention. He argues that the trial court misread the probation report that "clearly stated that defendant had been placed on probation as a juvenile on only four or five charges of burglary. A fair reading of the probation report would indicate that the

other arrests on at least 15 different occasions were not reduced to adjudications of delinquency" and were thus improperly considered as was his commitment to a State's boy's farm. He concludes that reliance upon arrests and commitment was not harmless because the only other juvenile record consisted of probation on prior burglaries "which cannot be conclusively shown on the record to be adjudications of delinquency."

Defendant's argument is without merit. There was no contention made before the trial court that the burglary offenses charged against defendant while he was a juvenile and for which he was placed on probation did not involve delinquency adjudications. Moreover, the penitentiary sentence imposed was fully justified based upon defendant's guilty plea to theft and his admission to the burglary set forth in the revocation petition. Accordingly, the judgment of the appellate court in cause No. 46382 is affirmed.

Judgments affirmed.

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CITATIONS

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IN THE

Supreme Court of the United States

No. 74-6079

DELBERT BEARD,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 59 Ill. 2d 220 (1974), and is included as an appendix to the petition.

The opinion of the Appellate Court affirming the Circuit Court of Cook County, Criminal Division is reported at 15 Ill. App. 3d 663 (1973) and is also included as an appendix to the petition.

STATEMENT OF JURISDICTION

Jurisdiction in this court has been adequately alleged.

QUESTION PRESENTED FOR REVIEW

Whether due process and equal protection require that a probationer be admonished by the court before an admission of probation violation can be accepted as being knowingly and intelligently given.

STATUTES INVOLVED

Illinois Revised Statutes, Ch. 110 A, sec. 402 (1973) is set out in the petition.

STATEMENT OF THE CASE

The facts of the case are adequately set forth in the petition.

REASONS FOR DENYING THE WRIT

The point of departure on the question of what due process of law requires in probation revocation cases is, of course, the United States Supreme Court case on the subject, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). In *Gagnon* the Court held that due process requires (a) notice of the claimed probation violations; (b) disclosure of the evidence against the probationer; (c) an opportunity to be heard and to present witnesses; (d) "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)"; (e) a neutral and detached decision-maker; (f) a written statement by the fact-finder as to the basis for the revocation; and (g) appointed counsel in certain, but not all cases. *Id.* at 786, 790. There has been no allegation—(nor could there have been on the present record)—that the due process safeguards enunciated in *Gagnon* were not met in the instant case. None of the due process requirements of *Gagnon* necessitate or suggest that the equivalent of Illinois Supreme Court Rule 402 be administered at revocation hearings where the probationer does not contest the allegations against him. The American Bar Association Standards are to the same effect. ABA Project On Standards For Criminal Justice, Standards Relating To Probation, § 5.4 (1970).

It is significant that the *Gagnon* Court made no intimation that the dictates of *Boykin* v. *Alabama*, 395 U.S. 238 (1969), had any application to probation revocation proceedings. *Boykin* was the case which enunciated the due process requirements for guilty pleas and which gave rise to Rule 402. Indeed, the *Gagnon* Court implied the opposite when it suggested that even counsel might not be

required in the typical case where "the probationer or parolee has been convicted of committing another crime or has admitted the charges against him." 411 U.S. at 786. If the Court is willing to permit such admissions without even requiring the advice of counsel, it follows that the procedures set down in *Boykin* and Rule 402 would also not be required.

Gagnon v. *Scarpelli*, the landmark case on the question of what due process of law requires at probation revocation proceedings, can only be read as an implicit renunciation of the argument defendant makes in the instant case.

There are at least seven crucial differences, between guilty pleas and admission of probation violations, which mandate a difference between the procedures followed at the arraignment and those followed at the revocation hearing.

1. The due process rights of a probationer at a revocation hearing are, as a general matter, less exacting than those accorded to a defendant in a criminal prosecution. As the United States Supreme Court said regarding the right to counsel at a revocation hearing:

> The differences between a criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer. Without denying that there is some force in this argument, we think it a sufficient answer that we deal here not with the right of an accused to counsel in a criminal prosecution, but with *the more limited due process right of one who is a probationer* or parolee only because he has been convicted of a crime.

Gagnon v. *Scarpelli,* 411 U.S. 778, 789 (1973) (footnote omitted; emphasis added). *See also People* v. *Kostaken,* 16 Ill. App. 2d 395, 398, 148 N.E. 2d 615 (2d Dist. 1957); "A probationer is not in the same category as one charged by indictment or information."

The Court made the proposition clear that the probationers' rights are more limited than those of criminal defendants in a comparison of the rights of probationers to those of juveniles: "A juvenile charged with violations of a generally applicable statute is differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection." 411 U.S. at 789, n. 12. *A fortiori,* the probationer, as a general matter, is entitled to a lesser degree of protection than the criminal defendant.

2. One of the main reasons, of course, that strict safeguards are required regarding a plea of guilty is that the plea gives rise to a loss of liberty. But the deprivation of liberty involved in revocations of probation is less significant than that involved in guilty pleas. In *Gagnon,* the Court quoted with approval (411 U.S. at 781) the following passage from its opinion in *Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972) on parole revocation, and the *Gagnon* Court went on to hold (411 U.S. at 781-82) that from a due process perspective there are no significant differences between probation and parole revocation.

> Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Since probation revocations involve only the loss of the conditional liberty properly dependent on observance of special probation restrictions, and since what is at stake

in a criminal prosecution is the absolute liberty to which every citizen is entitled, probation revocations do not involve as severe a deprivation of liberty as does a criminal conviction.

3. A guilty plea entails the waiver of the constitutional right to a jury trial. But an admission of a probation violation does not involve such a waiver, since a probationer has no right to a jury trial (*People* v. *Temple*, 131 Ill. App. 2d 955, 958, 268 N.E. 2d 875 (1971)).

4. A guilty plea entails the additional waiver of the constitutional right to confront and cross-examine adverse witnesses. But an admission of a probation violation involves the waiver of a more limited right. Unlike at a criminal trial, the judge at a probation hearing may, on the basis of "good cause," refuse to allow confrontation. *Gagnon* v. *Scarpelli, supra,* 411 U.S. 778, 786 (1973). Moreover, in the instant case since the State would have proved its case merely by introducing a certified copy of petitioner's bank robbery conviction, the petitioner would have had no one to cross-examine even if he had put the State to its full proof. Therefore, in the instant case petitioner waived no meaningful confrontation right; as a general matter, the most a probationer can waive is a limited confrontation right.

5. The primary reason cited by the United States Supreme Court in *Boykin* v. *Alabama,* 395 U.S. 238 (1969), that strict procedures are required regarding guilty pleas, is that: "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Id.* at 242. In this respect, an admission of a probation violation differs critically from a guilty plea. For, such an admission is completely irrelevant to the

question of whether a conviction is appropriate. Indeed, such an admission does not even make inevitable a revocation of probation.

Although in many cases it ultimately leads to a loss of liberty, an admission of a probation violation is nonetheless significantly different from a conviction. Whereas a conviction is a determination of the far more fundamental and consequential issue of guilt, an admission of a probation violation is relevant only to the question of what sentence is appropriate. Indeed, only after a conviction is obtained, will the question of probation or its revocation even arise. As the United States Supreme Court said in *Gagnon* regarding the rights of probationers, "we deal here not with [an accused's right] in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee *only because* he has been convicted of a crime." 411 U.S. at 789 (emphasis added). An admission of a probation violation, therefore, is critically different from a guilty plea, since the latter, unlike the former, "is itself a conviction" (*Boykin*, 395 U.S. at 242).

6. Furthermore, merely that a defendant has violated probation does not necessarily mean his probation will be revoked. Ill. Rev. Stat. 1971, ch. 38, § 117-3(d) (repealed 1973), under which the defendant's probation was revoked, provided: "If the court determines that a condition of probation has been violated, the court *may* alter the conditions of probation or imprison the probationer . . ." (emphasis added). The Unified Code of Corrections states more explicitly that a violation of probation will not automatically result in a revocation of probation:

> If the court finds that the offender has violated a condition at any time prior to the expiration or termi-

> nation of the period, it may continue him on the existing sentence, with or without modifying or enlarging the conditions, or may impose any othr sentence that was available under Section 5-5-3 at the time of initial sentencing.
>
> Ill. Rev. Stat. 1973, ch. 38, § 1005-6-4(e) (footnote omitted).

Thus, the relationship between an admission of a probation violation and a revocation of probation is not analogous to the relationship between a guilty plea and a conviction. For, whereas a guilty plea "is itself a conviction" (*Boykin*, 395 U.S. at 242), a judge, under our sentencing statutes, may decide not to revoke probation even though there has been a finding of violation of probation. In other words, whereas a guilty plea, ipso facto, gives rise to a conviction ("nothing remains but to give judgment and determine punishment," *Boykin*, 395 U.S. at 242), the decision to revoke probation will be based not only on the circumstances of a violation, but also on additional factors such as whether the probationer has demonstrated such dangerousness that he must be separated from society and whether his prospects for rehabilitation would be enhanced by continuing to allow the defendant to live and work outside prison walls. After a probationer has admitted a violation, his age, his criminal background, the nature of the crime for which he was convicted, as well as other factors, are considered by the judge to determine whether probation should be revoked. None of these factors, however, would be considered before entering judgment upon a plea of guilty; judgment would follow automatically. Therefore, the relationship between an admission of a probation violation and a revocation of probation is not analogous to the relationship between a guilty plea and a con-

viction. An admission of a probation violation is not as decisive, in producing a probation revocation, as a guilty plea is in causing a conviction.

7. Finally, what the State must prove at the usual probation revocation hearing differs significantly from what must be established at the typical criminal trial. At trial, the State must prove beyond a reasonable doubt that the defendant committed every element of the crime charged. This process may involve the examination of numerous witnesses who would attempt to expose criminal transactions, sometimes complex, and usually performed quickly and secretively. At the probation revocation hearing, on the other hand, the factual issues are ordinarily very simple, the proof need only be made by a preponderance of the evidence, and, as in the instant case, the incriminating evidence will be a matter of public record (the conviction for the offense allegedly committed during the probationary period). Thus, whereas with the guilty plea the defendant relinquishes a right to put the State to a very heavy burden of proof, by admitting a probation violation the defendant ordinarily waives merely the formality of the introduction into evidence of a certified copy of the conviction.

There are thus at least seven critical differences between guilty pleas and admissions of probation violations. These differences make unreasonable defendant's argument that pleas of guilty and admissions of probation violations may be equated and that the procedures appropriate to the former would, therefore, also be appropriate to the latter.

Because of two of the seven differences — no right to a jury trial, a limited right to confrontation — the rationale of *Boykin* v. *Alabama, supra,* 395 U.S. 238 (1969), becomes inapplicable to revocation hearings. In *Boykin,* the case

which enunciated the requirement for personal waivers for guilty pleas and which led to the enactment of Rule 402, the Court reached its result because a guilty plea entails the waiver of three important federal constitutional rights — the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. *Id.* at 243. But at a revocation hearing, there is no right to a jury trial, and the right to confrontation is more limited than the Sixth Amendment right accorded criminal defendants. Moreover, regarding the Fifth Amendment privilege, the Illinois Supreme Court has held that, even at a criminal trial where the defendant is entitled to a higher degree of protection than is a probationer at a revocation hearing, judicial admonishments need not precede a waiver of the defendant's right not to incriminate himself. *People* v. *Roberson*, 30 Ill. 2d 168, 195 N.E. 2d 722 (1964). Furthermore, the defendant in the instant case by his admission to a probation violation did not incriminate himself with regard to future criminal prosecutions, since all that he admitted was that he had been convicted of having committed a crime during the probationary period. Moreover, to the extent defendant in the instant case incriminated himself, he did so regarding an event (the conviction for bank robbery) which was a matter of public record anyway. The admission, therefore, was really no more self-incriminatory than a stipulation in a rape case to the defendant's age.

Since, unlike a guilty plea, an admission of a probation violation does not entail the waiver of the three federal constitutional rights relied on in *Boykin*, the personal waiver requirements of *Boykin*, and of Rule 402, should not be required at revocation hearings. As the California Court of Appeal put it:

> The trial involves "the fundamental constitutional right of a person accused of crime to plead not guilty to the charge and have a trial by a jury of his peers wherein he can defend himself by confronting and cross-examining witnesses against him and by presenting witnesses in his own behalf." [Citation.] It is the waiver of the full scope of those rights that must be made by a defendant personally, whereas he may waive part of them by acquiescing by silence in his counsel's conduct. [Citation.] A probation revocation hearing involves some, but by no means all, of the fundamental rights afforded a defendant at trial. Its purpose is not to determine guilt or innocence, but is whether conditions attached to an act of clemency have been met. There is no right to a jury trial. Confrontation in the proceeding is not an absolute right. . . .
>
> We thus conclude that the principles of *Boykin* [and certain California decisions] do not apply to proceedings to revoke probation where the matter is submitted on the report of the probation officer.
>
> *People* v. *Dale*, 112 Cal. Rptr. 93, 95-96 (App. 1973).

In summary, since (1) probationers at a revocation hearing are entitled to a lesser degree of protection than are criminal defendants, since (2) the deprivation of liberty at stake at a revocation hearing is not as great as in a criminal prosecution, since (3) an admission of a probation violation, unlike a guilty plea, does not involve the waiver of the right to a jury trial or (4) the waiver of the Sixth Amendment right to confrontation guaranteed to criminal defendants, since (5) an admission to a probation violation, unlike a guilty plea, does not give rise to a conviction, since (6) such an admission is not as decisive, in producing a probation revocation, as is a guilty plea in causing a conviction, and since (7) an admission of a probation violation, unlike a guilty plea, relieves the State, in the ordinary case, of a burden of proof which would

otherwise readily be met, the admission of a probation violation is an act which deserves far less judicial solicitude than does a guilty plea. Application of the cumbersome Rule 402 at revocation hearings, therefore, would unnecessarily transform what should be a simple, expeditious proceeding into a time-consuming, intricate exercise fraught with arguable grounds for appeal. Administration of the rule at revocation proceedings would thus be both inappropriate and imprudent. "[T]here are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." *Gagnon* v. *Scarpelli, supra,* 411 U.S. 778, 788-89 (1973).

CONCLUSION

Since the weight of authority and the landmark United States Supreme Court case on the subject oppose petitioner's argument, and since there are crucial differences between a guilty plea and an admission to a probation violation, this court should reject defendant's argument that Illinois Supreme Court Rule 402 should have been applied when defendant admitted that he had violated his probation. When the defendant through his attorney acknowledged that he had been convicted of having committed a bank robbery during the probationary period, the trial judge did not abuse his discretion by revoking defendant's probation. For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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